SHANMUGAM GOPAL

v.

ZINAL ABIDIN NAZIM & ANOR

HIGH COURT MALAYA, PULAU PINANG
MOHD NOOR ABDULLAH J
[CIVIL APPEAL NO: 12-153-2000]
28 MARCH 2003

DAMAGES: *Assessment - Loss of earning capacity - Permanent injuries - Expert evidence testifying to 20 - 30% disabilities - Whether future loss of earning capacity ought to be awarded - General damages - Pain and suffering - Future operation*

The learned Sessions Court judge in this case had refused to make an award for loss of earning capacity on the ground that it was the doctor, and not the plaintiff who had testified on the loss of earning capacity. The learned judge had further refused to give an award for pain and suffering for a future operation which the plaintiff had to undergo. The plaintiff appealed and argued that the aforesaid damages ought to be allowed as he had suffered permanent injuries as a result of the accident and been confirmed by the specialist to have 20 - 30% disabilities.

Held (allowing the appeal):

[1] The learned trial judge ought to have given credence to the evidence of the expert, especially so when it remained unchallenged and no expert was called by the defence to refute the evidence. Consequently, the learned judge was wrong in failing to make an award for loss of earning capacity. Upon the authorities and the inflation and loss in value of money, the court would award RM20,000 for loss of earning capacity. (pp 731 b-c & 732 b)

[2] Although the award for pain and suffering asked for was for a future operation, the award ought to be made at the date of the decision so as to bring finality to the claim. On the facts, the court would make an award of RM5,000 for pain and suffering for the future operation. (p 732 g-h)

Case(s) referred to:

Chong Ghee Kong & Anor v. Ng Yeow Hin [1997] 4 CLJ 17 HC ***(foll)***

Lee Chong Keong v. Cheang Kok Weng & Anor [1996] 4 MLJ 133; [1995] 1 LNS 107 HC ***(foll)***

Noe Kim Seng v. Clough Petrosen Pte Ltd [1996] 3 SLK ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 ***(refd)***

Tan Kim Chuan & Anor v. Chandra Nair [1991] 1 CLJ 682 SC ***(foll)***

Sam Wun Hoong v. Kader Ibramshah [1981] 1 MLJ 295 ***(refd)***

Yang Yap Fong & Anor v. Leong Pek Hoon & Anor [1987] 1 CLJ 377; [1987] CLJ (Rep) 419 ***(refd)***

For the appellant - Baldev Singh Bhar; M/s Syarikat Baldev Bhar

For the respondents - VK Dasaratharaj Pillai; M/s NP Nathan & Patners

Reported by WA Sharif

JUDGMENT

Mohd Noor Abdullah J:

This is an appeal by the appellant/plaintiff against the decision of the Sessions Court judge and the appeal proceeded on two grounds only, namely loss of earning capacity and the failure to make an award for pain and suffering for a future operation which the plaintiff had to undergo.

At the trial in the Sessions Court, the plaintiff called his employer and a specialist to prove his case on the question of damages. The specialist gave evidence stating that the appellant had suffered a closed fracture of the right femur, compound fracture of the right tibia and fibula, and fracture of the 4th and 5th metacarpal (right hand). The right femur after fixation of plate and screws had healed satisfactorily, with loss of 2 cm of muscles in the right thigh. In respect of the compound fracture of the tibia and fibula, there was now a 1 cm shortening and stiffness of the right ankle joint. In respect of the fracture to the metacarpals, the specialist states that there was a widening of the base of the 5th metacarpal with some areas of faint sclerosis and slight shortening of the 5th metacarpal. Based on the above disabilities the specialist states that the plaintiff has disabilities of 20-30%.

The employer gave evidence that the plaintiff, prior to his accident on 19 July 98 was employed at his factory as an electrical maintenance worker, with a salary of over RM1,000. After the accident, he did not work for ten months. After that he returned to work again at the same factory.

The plaintiff at the time of the accident was 26 years old, working as an electrical maintenance labourer. His job would require using a ladder and climbing up in high places.

The learned Sessions Court judge did not make an award for loss of earning capacity. His reasoning in the grounds of decision was that it was only the doctor who testified on the loss of earning capacity, whereas the plaintiff did not say so.

Counsel for the appellant submitted that the evidence of this nature, is always adduced by an expert ie, the specialist. The plaintiff is not an expert, and whether the court can ever accept the evidence of the plaintiff, that his disability is twenty to thirty percent. The learned trial judge should have given credence to the evidence of the expert, especially so when it remained unchallenged and no expert was called by the defence to refute this evidence. Even an employer or a co-worker will not be able to estimate what, is the percentage of loss of earning capacity except to give evidence as to his standard of performance before and after the injury.

In the Supreme Court case of *Yang Yap Fong & Anor v. Leong Pek Hoon & Anor* [1987] 2 MLJ 201 at 202G, Syed Agil Barakbah SCJ with the concurrence of the other Supreme Court judges, were of the view that the opinion is relevant in considering the principle applicable to future loss of earning capacity as decided in a number of cases. An Award of RM12,000 was made.

In the case of *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 MLJ 295, Mohd Azam J (as he then was) delivering the judgment of the then Federal Court said at p. 297.

> As regards loss of future earnings and future loss of earning capacity, although such loss can be implied in appropriate cases, the award should be a nominal one unless the plaintiff can prove such a future loss is in fact sufficiently severe to warrant a substantial award.

In *Lee Chong Keong v. Cheang Kok Weng & Anor* [1996] 4 MLJ 133, Chin Fook Yen JC (as he then was) held that in assessing damages, the future loss of earnings and loss of earning capacity can be implied in law, and is included in cases where the injuries suffered were such as to lead to continuing or permanent disability ... Being a nominal worker, the plaintiff had undoubtedly suffered a set back for life, especially with some wasting of the right forearm muscles and some shortening of the leg concerned.

In *Chong Ghee Kong & Anor v. Ng Yeow Hin* [1997] 4 CLJ 17, RK Nathan JC (as he then was) awarded a sum of RM36,000 for ten years loss of earning capacity, notwithstanding the fact that the evidence disclosed no loss of future earnings. The case of *Tan Kim Chuan & Anor v. Chandra Nair* [1991] 1 CLJ 682 was followed.

In the Singapore case of *Noe Kim Seng v. Clough Petrosen Pte Ltd* [1996] 3 SLK, Judith Prakash-J not only made an award for loss of future earning but also a sum of RM25,000 for loss of earning capacity, as she held that if ever the plaintiff lost his job, he would be at a disadvantage in his search for a new job.

I therefore hold that the learned Sessions Court judge was wrong in failing to make an award for loss of earning capacity. Based on the authorities and inflation and loss in value of money, I make an award of RM20,000 for loss of earning capacity.

The next issue raised by the appellant's counsel was with regard to the failure of the Sessions Court judge to make an award for pain and suffering for the future operation which the plaintiff had to undergo for the removal of the plate and screws. Undoubtedly, no person likes to undergo an operation. The anxiety caused is terrible. The plaintiff will have to travel back and forth from the hospital for dressing of the surgical wound and the removal of stitches.

General damages which are awarded for a tortuous act committed against a person or his property is a civil remedy which has as its aim to put the injured party back as it were, as far as possible to his original position maintained by him prior to the tortuous act which resulted in injury or damage. There can be no better definition of general damages than that by Syed Agil Barakbah FJ when he said in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; ([1983] CLJ (Rep) 300) at pp. 202-207 (p. 314).

> It must be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate ... The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant.

Although this is a future operation, the award for pain and suffering has to be made at the date of the decision so as to bring about the finality of the claim.

I therefore make an award in the sum of RM5,000 for pain and suffering for the future operation. This appeal is allowed with costs as agreed between the parties in the sum of RM4,000.